



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Darla W.,¹
Complainant,

v.

Dr. David J. Shulkin,
Secretary,
Department of Veterans Affairs
(Veterans Benefits Administration),
Agency.

Appeal No. 0120160042

Agency No. 2003-0331-2012100876

DECISION

On September 18, 2015, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 1, 2015, final decision awarding her nonpecuniary compensatory damages, in the amount of \$7,500, pursuant to its finding of employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission **AFFIRMS** the Agency's final decision.

BACKGROUND

Complainant worked as a Veterans Claims Examiner at the Agency's Regional Office in St. Louis, Missouri. On January 6, 2012, Complainant filed an EEO complaint in which she alleged that on November 22, 2011, the Agency discriminated against her on the basis of disability (lower back pain syndrome; heart condition; osteoarthritis in the right knee) by failing to provide her with a reasonable accommodation in the form of a handicapped parking space. From December 2011 through January 2013, Complainant was unable to park close to the entrance of the building in which she worked. The restriction was rescinded in January 2013. Also at that time, Complainant was allowed to telework from home. Investigative Report (IR) 104-05, 116-18; Supplemental Compensatory Damages Investigation (SCDI), Exhibit (Ex.) 6; Complainant's Supplemental Affidavit (CSA), p. 2.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

The Agency investigated the complaint and issued a final decision pursuant to 29 C.F.R. § 1614.110(b), in which it admitted that it had failed to reasonably accommodate Complainant as alleged. The Agency then conducted a supplemental investigation and issued a second final decision in which it determined that Complainant was entitled to \$7,500 in non-pecuniary compensatory damages only. It is from this second final Agency decision that Complainant appeals.

Complainant requested compensatory damages in the total amount of \$75,000, broken down as follows:

Pecuniary Losses:

• Medications -	\$2,160
• Future increased medications -	\$36,000
• Parking -	\$1,800
• Hospital Admissions -	\$12,000
• Moving car from parking lot -	\$1,500
• Unspecified miscellaneous fees -	<u>\$11,540</u>
Total Pecuniary Losses -	\$65,000

Non-Pecuniary Losses - \$10,000

Final Agency Decision on Damages (FADD), pp. 5, 7-11; CSA, p. 3; SCDI, Ex. 3, Ex. 4, Ex. 5.

In her supplemental affidavit, Complainant stated that management's failure to provide her with a timely and effective reasonable accommodation had aggravated her multiple conditions, including: systolic heart failure; hypertensive heart disease; mixed hyperlipidemia; and lower back pain syndrome. She averred that she had to be hospitalized on four occasions, three of which involved heart attacks. She also averred that she suffered financial losses as a result of numerous expenses she had incurred. She further stated that she had been diagnosed with chronic depression and that she was taking sixteen medications to control her various conditions. CSA, pp. 2-3, 8-9; SCDI, Ex. 4, Ex. 5. During the course of questioning by the EEO investigator, Complainant admitted that her mother had passed away in August 2014. CSA, pp. 4-6.

In its rebuttal statement, the Agency did not dispute that Complainant had significant health problems or that she was a qualified individual with a disability. The Agency maintained, however, that Complainant had not offered any evidence tending to demonstrate that any of her hospitalizations, need for medications, or any alleged aggravation of her medical conditions were attributable to the Agency's denial of her request for a handicapped parking space on November 22, 2011. The Agency also stated that Complaint was frequently observed by other employees walking without difficulty from her work station to the outside of the building to take smoking

breaks, and that Complainant's cigarette smoking itself had a significant impact on her health. SCDI, Ex. 6.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

When discrimination is found, the Agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975); Adesanya v. U.S. Postal Serv., EEOC Appeal No. 01933395 (July 21, 1994). Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). In West v. Gibson, 527 U.S. 212 (1999), the Supreme Court held that Congress afforded the Commission the authority to award compensatory damages in the administrative process. For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. 42 U.S.C. § 1981a(b)(3).

An Agency is not liable for compensatory damages under the Rehabilitation Act where it has consulted with complainant and engaged in good faith efforts to provide a reasonable accommodation, but has fallen short of what is legally required. Yost v. U.S. Postal Service, EEOC Appeal No. 01A51457 (June 13, 2006). Conversely, an Agency is liable for compensatory damages where it has not demonstrated a good faith effort to reasonably accommodate complainant. See Jambora v. U.S. Postal Service, EEOC Appeal No. 07A40128 (May 16, 2006); Burchfield v. Dept. of the Treasury, EEOC Appeal Nos. 01970152 & 01971579 (April 6, 2000), request for reconsideration denied, EEOC Request No. 05A10354 (June 13, 2001). The Agency acknowledged that the Education Officer's repeated requests for medical documentation and rejection of the documentation that Complainant had submitted constituted evidence of the Agency's lack of a good faith effort to reasonably accommodate Complainant. Final Agency Decision on the Merits, p. 10. Consequently, there is no question that Complainant is entitled to compensatory damages for the Agency's failure to reasonably

accommodate her disability between November 2011 and January 2013. The only remaining issue for the Commission to decide is the amount of the award.

We begin with Complainant's claim of entitlement to \$10,000 in non-pecuniary damages. Non-pecuniary losses are losses that are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See EEOC Notice No. 915.302 at 10 (July 14, 1992). There is no precise formula for determining the amount of damages for non-pecuniary losses except that the award should reflect the nature and severity of the harm and the duration or expected duration of the harm. See Loving v. Dep't of the Treasury, EEOC Appeal No. 01955789 (Aug. 29, 1997). The Commission notes that non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Furthermore, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone, but should be consistent with the amounts awarded in similar cases. See Ward-Jenkins v. Dep't of the Interior, EEOC Appeal No. 01961483 (Mar. 4, 1999).

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See Lawrence v. U.S. Postal Serv., EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)). Objective evidence of compensatory damages can include statements from complainant concerning emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. Id.

Statements from others including family members, friends, health care providers, and other counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown. Id. Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. Id. The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. Id. The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. Id.

Complainant has the burden of proving the existence, nature and severity of the alleged emotional harm. Man H. v. Dept. of Homeland Security, EEOC Appeal No. 0120161218 (May 2, 2017). Complainant must also establish a causal relationship between the alleged harm and the discrimination. Id. Absent such proof of harm and causation, a complainant is not entitled to compensatory damages, even if there were a finding of unlawful discrimination. Id. See also e.g. Wilda M. v. U.S. Postal Service, EEOC Appeal No. 0120141087 (Jan. 12, 2017) (Awards for emotional harm are warranted only if complainant establishes a sufficient causal connection between the agency's illegal actions and her injury).

In this case, the only evidence that Complainant submits in support of her claim for nonpecuniary damages is her own affidavit. She testified that she suffered some mental anguish and physical and emotional distress in the form of depression, insomnia, exacerbation of her cardiac condition and loss of self-esteem as a result of the discriminatory conduct. She has not submitted any statements from family, friends, or health care providers that tie the alleged aggravation of her pre-existing medical conditions to the Agency's failure to provide her with a handicapped parking space between November 2011 and January 2013. Moreover, Complainant failed to rebut the Agency's assertion that Complainant's smoking and the death of her mother were intervening factors that contributed to her medical conditions.

In cases like this, the Commission has typically awarded \$7,500.00. See Fidelia F. v. Dept. of Agriculture, EEOC Appeal No. 0120150584 (Apr. 11, 2017) (\$7,500.00 in non-pecuniary compensatory damages award based on mental anguish and humiliation, diminished self-esteem and self-worth, and health issues); Robinson v. Dept. of the Army, EEOC Appeal No. 01A31123 (May 26, 2004) (\$7,500.00 in non-pecuniary compensatory damages based on complainant's testimony about mental anguish, emotional stress, lowered professional status, a reduction in his ability to advance his career, humiliation, embarrassment, and intimidation); Butler v. Dept. of Agriculture, EEOC Appeal No. 01971729 (Apr. 15, 1999) (\$7,500.00 in non-pecuniary damages based on complainant's testimony regarding his emotional distress).

Under the circumstances presented in this case, we find that the Agency's award of non-pecuniary compensatory damages in the amount of \$7,500 is supported by the evidence, is neither "monstrously excessive" nor the product of passion or prejudice, and is consistent with prior Commission precedent. We will therefore order the Agency to award Complainant \$7,500 in non-pecuniary compensatory damages to the extent that it has not already done so.

We turn now to Complainant's claim for past and future pecuniary damages in the amount of \$65,000. While the documentation that Complainant submitted indicates that she had incurred some of the medical expenses she claimed, she has not presented evidence sufficient to tie those expenses to the denial of her reasonable accommodation request. In addition, she has not presented any documentation of the parking or vehicle-moving expenses that she claimed. We therefore agree with the Agency's finding that Complainant is not entitled to reimbursement for any of these claimed expenses.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final decision entitling Complainant to an award of non-pecuniary compensatory damages in the amount of \$7,500.00.

ORDER (C0610)

Within sixty (60) calendar days of the date this decision is issued, to the extent it has not already done so, the Agency is ordered to issue a check to Complainant in the amount of \$7,500.00.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The Agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

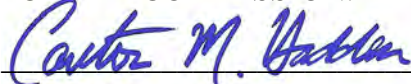
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 12, 2017

Date